Supreme Court of the United States

OCTOBER TERM, 1930.

No. 759.

THE UNITED STATES, *Petitioner*,

vs.

KIRBY LUMBER COMPANY.

MOTION TO REMAND TO COURT OF CLAIMS FOR FURTHER FINDINGS.

Comes now the Kirby Lumber Company by its attorney, Robert Ash, and moves that the above entitled cause be remanded to the Court of Claims with instructions to make a finding with reference to the consideration received by the Kirby Lumber Company for the bonds issued by it in 1923.

In June, 1923, the Kirby Lumber Company, issued $12,126,800 face value of bonds secured by a deed of trust on certain of its property. During 1923 the Kirby Lumber Company purchased $1,078,300 face value of the said bonds for $940,778.70, or $137,521.30 less than their face value, and retired them. The question for decision is whether the said $137,521.30 is income to the Kirby Lumber Company.

In the Court of Claims the case was tried on stipulated facts. The stipulation is correct as far as it goes. It states the bonds involved were issued at par, but does not state the consideration the Kirby Lumber Company received for them. The facts are that $11,526,800 in bonds, plus $9,776.94 in cash, were exchanged for preferred stock at the call price of $105 per $100 par value share plus accrued dividends of $126 per share, or a total of $231 for each $100 par value share of preferred stock. The remaining $600,000 of bonds were issued and placed in escrow to secure the payment of certain notes of the Kirby Lumber Company running to the Houston Oil Company. No cash was received for the bonds.

At the time the stipulation was entered into counsel believed that the consideration received for the bonds was immaterial as the transaction sought to be taxed was the purchase of bonds for less than their face value and their retirement. The language of the Court in *Burnet v. Sanford & Brooks Company*, 282 U. S. 359, however, indicates that the consideration received for the bonds may be material to the disposition of the case.

If the Court believes the consideration received for the bonds is material this motion should be granted and the case remanded to the Court of Claims for a finding on that point.

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Attorney for Kirby Lumber Company.

May, 1931.